No. 86-563

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In the Supreme Court of the United States

OCTOBER TERM, 1986

ANTONIO CIPOLLONE, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF ROSE D. CIPOLLONE, PETITIONER

v.

LIGGETT GROUP, INC., A DELAWARE CORPORATION; PHILIP MORRIS INCORPORATED, A VIRGINIA CORPORATION; AND LOEW'S THEATRES, INC., A NEW YORK CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

In the Federal Cigarette Labeling and Advertising Act, Congress itself specified the precise health warning label that must be affixed to all cigarette packages, and provided further that "[n]o * * * other [health warning] shall be required" on cigarette packages and that "State law" may impose "[n]o requirement or prohibition based on smoking and health" with respect to the "advertising or promotion" of properly labeled cigarettes. The question presented is whether, notwithstanding the federal statute, petitioner may maintain a tort action under state law against cigarette manufacturers, who have at all times complied fully with the federal act, for injuries allegedly caused by their supposed failure to give "adequate" warnings about the health risks of smoking.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 6a-19a) is reported at 789 F.2d 181. The opinion of the district court (Pet. App. 20a-73a) is reported at 593 F. Supp. 1146.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1986 (Pet. App. 4a-5a). A petition for rehearing was denied on May 9, 1986 (Pet. App. 2a). On July 21, 1986, Justice Brennan extended the time within which to file a petition for a writ of certiorari until October 6, 1986, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The pertinent sections of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1331 *et seq.*, are set out in the Addendum to this brief, pages 1a-5a, *infra*.

STATEMENT

1. **Introduction.**—This is a products liability action instituted by Rose D. Cipollone and her husband, Antonio Cipollone,[1] against respondents Liggett Group Inc., Philip Morris Incorporated, and Loew's Theatres, Inc. Plaintiffs alleged that Rose Cipollone developed lung cancer because, for some 40 years, she smoked cigarettes manufactured by respondents. The complaint asserted, *inter alia*, that respondents are liable under New Jersey tort law for Rose Cipollone's death because they failed to provide adequate warnings about the health consequences of smoking. Respondents, who have at all times fully complied with the warning requirements of the Federal Cigarette Labeling and Advertising Act (the "Act" or the "Labeling Act"), 15 U.S.C. 1331 *et seq.*, defended, *inter alia*, on the ground that some or all of plaintiffs' claims were preempted by that Act. The district court granted plaintiffs' motion to strike all defenses based on preemption. It held that compliance with the federal warning requirements is insufficient and inadequate, and that the states are free to impose tort liabilities for failure to comply with more stringent warning requirements imposed by state common law. The court of appeals, on certified interlocutory appeal, reversed. It held that the federal Act preempts state-law challenges to the adequacy of the congressionally designated warning and remanded the case to the district court for further proceedings to determine exactly which parts of the plaintiffs' complex and confusing complaint should be deemed pre-

[1] Mrs. Cipollone died on October 21, 1984. Her husband, petitioner Antonio Cipollone, has continued the lawsuit, individually and as the executor of his wife's estate. Pet. App. 8a.

empted. Those proceedings are at this time underway in the district court. In the meantime, petitioner now seeks review in this Court of the interlocutory ruling of the court of appeals.

The provisions and background of the Labeling Act provide the necessary starting point for an understanding of this case.

2. **The Cigarette Labeling Act.**—On three separate occasions—in 1965, 1969, and 1984—Congress expressed with unmistakable clarity its intent to provide the public with what it itself determined to be *adequate* warnings about smoking and health. At the same time, Congress made it equally clear that it wished to protect interstate commerce and the economy from the burdensome imposition of competing nonuniform warning requirements and regulations by the states. The Act's statement of policy provides as follows (§ 1331)[2]:

> **Congressional declaration of policy and purpose**
>
> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal Program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—
>
> (1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with

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[2] Unless otherwise indicated, citations to sections of the Act are to the Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282, as amended by the Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87, codified at 15 U.S.C. 1331 *et seq.* The Act was further amended in 1984 by the Comprehensive Smoking Education Act, Pub. L. No. 98-474, 98 Stat. 2200.

this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.[3]

To effectuate these goals, Congress *itself* prescribed the precise words of warning to be placed on each package of cigarettes (§ 1333):

Labeling requirement; conspicuous statement

It shall be unlawful for any person to manufacture, import, or package for sale or distribution within the United States any cigarettes the package of which fails to bear the following statement: "Warning: The Surgeon General Has Determined That Cigarette Smoking is Dangerous to Your Health." Such statement shall be located in a conspicuous place on every cigarette package and shall appear in conspicuous and legible type in contrast by typography, layout, or color with other printed matter on the package.[4]

Congress also prohibited anyone from requiring a different warning; the Act contains the following preemption provisions (§ 1334):

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[3] Subparagraph (1) of Section 1331 was amended in October 1984 (Pub. L. No. 98-474, § 6(a), 98 Stat. 2204, to be codified at 15 U.S.C. 1331(1)) to read as follows:

(1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; * * *.

[4] The label originally drafted by Congress in 1965 provided as follows: "Caution: Cigarette Smoking May Be Hazardous to Your Health." Pub. L. No. 89-92, § 4, 79 Stat. 283. The label was amended by the 1969 Act to read as set forth in the text. The 1984 Act requires the use of four rotating warning labels. As in 1965 and 1969, Congress in 1984 drafted the warning labels itself and included them in the statute. Comprehensive Smoking Education Act, Pub. L. No. 98-474, § 4, 98 Stat. 2201-2202 (to be codified at 15 U.S.C. 1333).

Preemption

(a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.

(b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.[5]

To complete the statutory scheme, the Act requires the Federal Trade Commission and the Secretary of the Department of Health and Human Services to report to Congress annually about cigarette promotion and advertising practices and about current information on the health consequenecs of smoking, as well as to make recommendations for legislation (§ 1337). The Act provides for criminal penalties and authorizes the federal district courts to enjoin violations (§§ 1338 and 1339).

The Act thus does not leave to speculation either its essential purposes or the means by which those purposes are to be achieved. The paramount ends are: (1) to give potential smokers what Congress itself determined to be an adequate warning about the relationship between smoking and health; and (2) to protect commerce against competing legal regimes that could impose disuniform and confusing warning requirements. To achieve these ends, Congress (1) itself specified the exact language of the warning to be included on all cigarette packages (and even addressed the question of size of print and placement on packages); (2) prohibited anyone from requiring any other health warning on cigarette packages; and (3) prohibited anyone from invoking state law for the purpose of imposing any requirement or prohibition re-

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[5] Section 1334(b) of the Act was amended by the 1969 Act to read as quoted above. See pages 8, 10-11, *infra*, for the language of Section 1334(b) in the 1965 Act and for an explanation of the changes.

lating to smoking and health in the advertising or promotion of cigarettes labeled in compliance with the Act.

3. The Legislative Background Of The Labeling Act.

a. *The 1965 Act.*—Prior to 1965, there existed no statutory or administrative regulation of cigarette labeling or advertising, and, although failure-to-warn cases had been brought, no cigarette manufacturer had been held liable. See note 15, *infra*. In 1965, Congress decided to act affirmatively and definitively with respect to the subject of smoking and health by enacting the first cigarette labeling and advertising statute (Pub. L. No. 89-92, 79 Stat. 282). The genesis of the 1965 Act's "comprehensive Federal Program" (§ 1331) was the 1964 Surgeon General's Report, which concluded that "[c]igarette smoking is a health hazard of sufficient importance in the United States to warrant remedial action." [6] Soon thereafter a number of states proposed laws to regulate cigarette advertising and labeling.[7] The FTC also promulgated a regulation that would have required a warning to be placed on cigarette packages and in advertisements. 29 Fed. Reg. 530 (1964); 29 Fed. Reg. 8324 (1964).

Extensive hearings on the subject of smoking and health made it readily apparent to Congress that diverse action by various states would produce chaos in the national economy. The need for a single, federal legislative response was summarized in the 1965 House Report (at 3):

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[6] *Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service* 33 (1964), *quoted in* H.R. Rep. 449, 89th Cong., 1st Sess. 2 (1965) [hereinafter cited as "1965 House Report"].

[7] See, *e.g.*, 111 Cong. Rec. 13901 (1965) (statement of Sen. Moss); *Cigarette Labeling and Advertising: Hearings on S. 559 and 547 Before the Senate Comm. on Commerce*, Pt. 1, 89th Cong., 1st Sess. 39 (1965) (statement of Sen. Magnuson) [hereinafter cited as "1965 Senate Hearings"].

> The determination of appropriate remedial action in this area * * * is a responsibility which should be exercised by the Congress after considering all facets of the problem. The problem has broad implications in the field of public health and health research, and involves potentially far-reaching consequences for a number of sectors of our economy. The entire tobacco raising and manufacturing industry, and the numerous businesses which market tobacco products, are involved. * * *
>
> After giving consideration to various alternative approaches to the problem, the committee determined that congressional action should be taken in order to dispose of this problem promptly and effectively.

The same theme was echoed in the floor debates. Senator Magnuson told the full Senate (111 Cong. Rec. 13893 (1965)):

> There was general agreement among the witnesses appearing before the committee, whether or not they favored a warning requirement on cigarette packages, that if the committee took any action in this field, such a requirement should be uniform; otherwise a multiplicity of State and local regulations pertaining to labeling of cigarette packages could create chaotic marketing conditions. Thus, the committee bill, by preempting the field, precludes any Federal, State, or local authority from requiring any warning statement other than that required by this bill on cigarette packages.

Congress also determined that the subject of smoking and health was too important to be delegated to any federal agency. In particular, Congress doubted "the necessity for, and the effectiveness of" the FTC's rule insofar as it would have required the inclusion of a warning in all cigarette advertising. 1965 House Report 4. Instead, Congress decided by statute to require a compulsory package label, rendering further action by the FTC unnecessary and superseding the FTC's trade regulation rule. Consequently, the preemption provision of

the 1965 Act barred *anyone* from supplementing Congress' action (Pub. L. No. 89-92, § 5, 79 Stat. 283):

> (a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.
>
> (b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.[8]

Having determined that the interests of interstate commerce and the national economy required a single, uniform, statutory Federal warning, Congress was equally insistent that that warning should be *adequate*. As the Senate Report explained (S. Rep. 195, 89th Cong., 1st Sess. 4 (1965) [hereinafter cited as "1965 Senate Report"]):

> [W]hile the Committee believes that the individual must be safeguarded in his freedom of choice—that he has the right to choose to smoke or not to smoke —we believe equally that the individual has the right to know that smoking may be hazardous to his health.
>
> Therefore the Committee is satisfied that the public interest requires the inclusion of a fair and factual cautionary statement on every cigarette package.
>
> Such cautionary statement should be short and direct, and should not be weakened in its impact by any qualifying adjectives, such as "excessive," "continual," or "habitual." To this end, the committee has concluded that the following factual and succinct

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[8] Congress did preserve the FTC's traditional authority to regulate unfair or deceptive advertising practices under Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. See Section 5(c) of the 1965 Labeling Act, Pub. L. No. 89-92, 79 Stat. 283.

statement should now be prescribed: "Caution: Cigarette smoking may be hazardous to your health." [9]

b. *The 1969 Act.*—Section 1334(b) of the 1965 Act, preempting the requiring of "statement[s] relating to smoking and health * * * in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act" (Pub. L. No. 89-92, § 5(b), 79 Stat. 283), was destined to expire after three years. Pub. L. No. 89-92, § 10, 79 Stat. 284. In anticipation, the FTC proposed another rule regulating cigarette advertising, requiring all cigarette advertising to list a number of specific diseases allegedly caused by smoking. 34 Fed. Reg. 7917 (1969). At the same time, the Federal Communications Commission proposed a rule banning all radio and television advertising of cigarettes. 34 Fed. Reg. 1959 (1969).

As in 1965, Congress again stepped in and determined that it alone should act in this field. Thus, Congress determined that the ban against radio and television advertising should be imposed by statute rather than by the FCC's proposed rule; and Section 6 of the 1969 Act, Pub. L. No. 91-222, 84 Stat. 89 (codified at 15 U.S.C. 1335), made cigarette advertising on any medium of electronic communication unlawful after January 1, 1971. As the House Report stated, "the committee feels that it is incumbent on the Congress to act on the reported legislation in order to prevent intrusion by the Federal Communications Commission and the Federal Trade Commission into basic areas of policymaking which it has reserved to itself." H.R. Rep. 91-289, 91st Cong., 1st Sess. 5 (1969).

Further, Congress amended the warning label on cigarette packages to provide: "Warning: The Surgeon Gen-

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[9] To ensure maximum effectiveness for its label, Congress even considered its precise size and placement on cigarette packages. See, *e.g.*, 1965 Senate Report 4 (discussing the committee's desire to "secure the necessary prominence and conspicuousness of the warning on each package").

eral Has Determined That Cigarette Smoking Is Dangerous to Your Health" (§ 1333); but it declined to enact a more elaborate warning statement, comparable to that proposed by the FTC, that had passed the House. The Senate Report explained (S. Rep. 91-566, 91st Cong., 1st Sess. 13 (1969) (emphasis added)):

> The committee is concerned that the proposed modifications in H.R. 6543, as passed by the House, *have resulted in a warning statement that is so lengthy that it may lose its impact. It might also serve to create consumer confusion.* The committee accepts the judgment that excessive smoking "is" dangerous to the health of the particular smoker, and in that respect the committee believes that the package warning statement warrants strengthening by changing the statement from "may be" to "is." In the committee's view, the proposed warning statement is both scientifically accurate, and *sufficiently short and pointed to constitute an effective warning.*

The actual language of preemption employed in the 1969 Act reaffirmed and, indeed, strengthened Congress' determination to exclude the states from imposing additional or different requirements. First, by reaffirming Section 1334(a) without change in any respect, Congress again declared that its own warning statement was to be the only statement relating to smoking and health that could be placed on cigarette packages. Second, Congress made the preemption of state law even more sweeping and explicit by amending Section 1334(b) to provide (emphasis added):

> No *requirement or prohibition* based on smoking and health shall be imposed *under State law* with respect to the advertising *or promotion* of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

Thus, in contrast to the "no statement * * * shall be required" language of Section 1334(b) in the 1965 Act, the 1969 version preempted all "requirement[s] or pro-

hibition[s]," specified that preemption was directed at "State law," and extended preemption to include the "promotion" of cigarettes as well as their advertising. Notably, in choosing the phrase "under State law," Congress deliberately rejected the much narrower phrase, "State statute or regulation," that had passed the Senate. See S. Rep. 91-566, *supra*, at 16; H.R. Rep. 91-897, 91st Cong., 2d Sess. 1 (1970).

c. *The 1984 Act.*—Inasmuch as Rose Cipollone died before the effective date of the 1984 Act, that Act is not involved in this case. It bears noting, however, that in 1984 Congress itself specified the warning language to be used not only on cigarette packages but also in cigarette advertising, providing that it was to be identical to the language of the four rotating warning labels specified for placement on packages. Comprehensive Smoking Education Act, Pub. L. No. 98-474, § 4(a)(2) and (3), 98 Stat. 2202. Congress also specified in detail the typography and placement of the advertising labels. *Id.* at § 4(b)(2) and (3).

In sum, from passage of the original Act in 1965 to the present day, Congress has reserved for itself and completely occupied the entire field of "cigarette labeling and advertising with respect to any relationship between smoking and health" (§ 1331).

4. **The Allegations In Plaintiffs' Complaint.**—Plaintiffs' Second Amended Complaint set forth eight causes of action and sought compensatory and punitive damages. Because of the confusing manner in which the complaint was drafted, the extent to which plaintiffs' case entailed an attack on Congress' statutory scheme was unclear. At least two counts of the complaint were, however, based exclusively on the assertion that respondents failed to provide adequate warnings of the health consequences of cigarette smoking (Third and Fifth Counts) (C.A. App. A3-A5, A7-A8). Plaintiffs also alleged that respondents'

cigarettes were inherently unsafe and defective and presented a risk to Rose Cipollone greater than their social utility (Second Count) (C.A. App. A2-A5); that respondents were negligent in their testing, research, promotion and advertising of cigarettes (Fourth Count) (C.A. App. A6-A7); that respondents "intentionally, willfully and wantonly" attempted to "neutralize" the warnings required by the Labeling Act (Sixth Count) (C.A. App. A8-A9); that respondents breached express warranties (Seventh Count) (C.A. App. A9-A10); that respondents conspired to deprive the public of medical and scientific data concerning the health consequences of smoking (Eighth Count) (C.A. App. A10-A11); and that respondents' cigarettes were defective by virtue of their addictive properties, thereby rendering any warnings meaningless (Ninth Count) (C.A. App. A11-A12).

Because some, if not all, of these allegations necessarily attacked the integrity of the statutory scheme enacted by Congress, each of the respondents' answers included, *inter alia*, a defense based on the preemptive effect of the Act. Plaintiffs responded by filing a motion to strike the preemption defenses.

5. **The Decisions Below.**—On September 20, 1984, the district court granted plaintiffs' motion to strike respondents' preemption defenses (Pet. App. 20a-73a). The district court concluded that the Act's preemption provision, 15 U.S.C. 1334, applies only to state statutes and regulations, not to requirements or prohibitions imposed by the state law of torts and enforced by courts and juries in damage actions. The district court reasoned: (1) that the Act does not expressly preempt state common law claims either on its face or based on an analysis of the legislative history (Pet. App. 34a-41a); and (2) that Congress did not impliedly preempt state common law claims by "occupying the field" or creating an "irreconcilable conflict" between the Act and state common law standards (*id.* at 57a-72a).

The district court certified the preemption issue for interlocutory appeal pursuant to 28 U.S.C. 1292(b), and the court of appeals agreed to hear the case (Pet. App. 7a). A unanimous panel of the court of appeals reversed the district court's grant of plaintiffs' motion to strike respondents' preemption defenses (*id.* at 6a-19a). The court of appeals explained (*id.* at 16a-17a (citations omitted)):

> Congress has provided us with an explicit statement of the Act's purposes in section 1331. That statement reveals that the Act represents a carefully drawn balance between the purposes of warning the public of the hazards of cigarette smoking and protecting the interests of national economy. * * * Moreover, the preemption provision of section 1334, read together with section 1331, makes clear Congress's determination that this balance would be upset by either a requirement of a warning other than that prescribed in section 1331 or a requirement or prohibition based on smoking and health "with respect to the advertising or promotion" of cigarettes. * * *.
>
> [W]e accept the [respondents'] assertion that the duties imposed through state common law damage actions have the effect of requirements that are capable of creating "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." * * *
>
> [W]e conclude that claims relating to smoking and health that result in liability for noncompliance with warning, advertisement, and promotion obligations other than those prescribed in the Act have the effect of tipping the Act's balance of purposes and therefore actually conflict with the Act. Based on the foregoing, we hold that the Act preempts those state law damage actions relating to smoking and health that challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and

> promotion of cigarettes. We further hold that where the success of a state law damage claim necessarily depends on the assertion that a party bore the duty to provide a warning to consumers in addition to the warning Congress has required on cigarette packages, such claims are preempted as conflicting with the Act.

The court of appeals went on to state that "it is not necessary at this stage of the litigation for us to identify which of the Cipollones' claims are preempted by the Act" (Pet. App. 18a), because the only question before the court was the correctness of the district court's order striking all preemption defenses. The court of appeals stated that, because "the factual background for [this] case is largely undeveloped," the "appropriate" disposition is "to reverse the order of the district court and remand the case for further development of the claims and theories of the parties. The district court will then be in a position to make informed and definitive rulings on which claims then in contention are preempted" (*id.* at 19a).

6. **The Preemption Question In The Other Circuits.**—The question at issue in this case—the preemptive effect of the Labeling Act on state tort claims—has not been decided by any other court of appeals; it has in fact just commenced the "simmering" process. The First Circuit heard argument on the question in October 1986, but at this writing has not decided the case. *Palmer* v. *Liggett Group, Inc.*, 633 F. Supp. 1171 (D. Mass. 1986), appeal pending, No. 86-1525 (1st Cir.). Appeals on this question are also pending in the Sixth Circuit and the Eleventh Circuit; the former case has been briefed and is awaiting argument, and the latter is now being briefed. See *Roysdon v. R.J. Reynolds Tobacco Co.*, 623 F. Supp. 1189 (E.D. Tenn. 1985), appeal pending, No. 86-5702 (6th Cir.); *Stephen* v. *American Brands, Inc.*, No. PCA 86-4004-RV (N.D. Fla. Aug. 7, 1986), appeal pending, No. 86-2106 (11th Cir.).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The question presented, albeit significant, should not now be decided by this Court: it is at this time only beginning to be considered in the courts of appeals, and it will benefit from the sifting process of consideration in a number of different contexts in a number of different courts. Further, this case does not present an appropriate context for the definitive resolution of the preemption issue by this Court: the ruling of the court of appeals is interlocutory and—for that reason—somewhat abstract. Accordingly, further review is not warranted.

1. a. Petitioner asserts (Pet. 10-16) that the court of appeals' decision conflicts with decisions rendered by this Court and other federal courts. But the fact is that this Court has never addressed the issue of the preemptive force of the Labeling Act and, as petitioner himself concedes (Pet. 10-11), the court below is the first federal appellate court to pass on this issue. See page 14, *supra*. Petitioner attempts to create a conflict by citing (Pet. 13-16) various decisions involving the issue of preemption in the context of other federal statutes. But the claim of conflict fails, because none of these other statutes are at all like the Labeling Act. This Court has warned that the issue of preemption "turns on the peculiarities and special features of the federal regulatory scheme in question." *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638 (1973); see also *Chicago & Northwestern Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981). And this warning is particularly apt in connection with the unique features of the meticulously calibrated Federal Cigarette Labeling and Advertising Act, in which Congress—on three separate occasions—specified its intention to occupy the entire field of cigarette labeling and advertising with

respect to any connection between smoking and health. Only when other circuits have addressed the preemption issue presented by the Labeling Act itself, as they are now in the process of doing, will there arise the possibility of an actual conflict warranting review by this Court. Cf. *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 135 n.26 (1977) ("This litigation exemplifies the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals.").

b. The decision below is, in any event, interlocutory (see page 14, *supra*); the district court is at this very time considering, in light of the court of appeals' mandate, which of petitioner's eight causes of action are or are not preempted. Until the lower courts have had the opportunity actually to *apply* the legal standard enunciated by the court of appeals to the ambiguous and multifarious claims contained in petitioner's complaint, review by this Court would be premature.[10]

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[10] In a recently filed brief urging this Court to grant the petition, amici curiae American Heart Association *et al.* point out that in this case, as well as in the *Palmer* case in the First Circuit, it was the respondents who sought (and obtained) interlocutory review in the courts of appeals—after the district courts in those cases ruled that the Labeling Act has no preemptive effect whatever on failure-to-warn claims against cigarette manufacturers. Those district court rulings were, of course, interlocutory in the sense that they did not finally dispose of the entire *case*; but they did purport to dispose finally and definitively of the issue of preemption. It therefore made obvious sense for the courts of appeals to determine at that point, prior to trial, whether and to what extent a trial need occur at all; that is why three courts of appeals have concluded that the issue is an appropriate one for interlocutory appeal under 28 U.S.C. 1292(b).

But none of this has any bearing whatever on the question whether it is wise for this Court to review this case now, after the court of appeals has held that the Act does have preemptive force and remanded to the district court to sort out its precise effect on the plaintiffs' variegated complaint. The point is that, under the court of appeals' ruling, the issue of preemption itself has not been finally and definitively adjudicated, but is at this very moment in

2. Review by this Court is also unwarranted because the decision below is correct.

a. Ever since 1965 Congress has assumed a peremptory exclusive jurisdiction to determine what legal obligations should be imposed on manufacturers of cigarettes to provide the public with warnings about the relationship between smoking and health. Congress assumed this role because it determined, after extensive legislative inquiries, that it should protect interstate commerce and the national economy by itself prescribing on a nationwide and uniform basis exactly what the cigarette companies' obligations should be. Congress' purpose was to create something that did not exist in 1965: a mandatory and effective system of warning rules that would be prospective, uniform, easily understood and obeyed, and easily policed, one whose adequacy could be effectively monitored and fine-tuned from time to time by Congress itself. (In fact, Congress has on two separate occasions itself revisited, reappraised, and modified these federal warning rules.) Congress made it crystal clear that it wished at the same time completely to eliminate any and all competing warning regimes, because these might lead to diverse, disuniform, and confusing warning practices that would threaten to impede commerce and the national economy.

This case presents the question whether Congress' determination, that it wishes to take exclusive jurisdiction over the issue of what is an adequate warning with respect to the health risks of cigarette smoking, is to be honored, or whether it may, rather, be summarily set aside by judges and juries who reach the conclusion that

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the process of sorting out in the district court. It is the provisional and abstract nature of the court of appeals' ruling on the issue of preemption itself (rather than the lack of finality in disposing of the entire case) that makes this case a singularly inappropriate and premature vehicle for this Court's definitive consideration of the preemption issues raised by the Labeling Act.

the congressionally drafted warning is inadequate and that respondents should have complied with different—and presumably more stringent—warning obligations imposed by the state law of torts.

The question in this case is not whether cigarette companies should be under a legal obligation to provide the public with adequate warnings about any health dangers of smoking cigarettes. Rather, the sole question is: *who decides* whether the warnings given by respondents were or were not adequate? The district court held in this case that the question of the adequacy of the congressionally drafted and mandated warning may be submitted to juries and judges in fifty different states who are quite free to come to their own divergent conclusions as to whether the congressional warning was adequate or whether a "better" warning—one required by state law—should have been provided. The court of appeals' simple and correct answer was that Congress' determination, that the federal warning is an adequate warning that is to constitute an exclusive and uniform warning, is wholly authoritative and may not be set aside by judges and juries any more than by state legislatures and administrative agencies.

b. Petitioner asks this Court to rule that Congress' express language, that no warnings other than the congressional warning may be "required," and that no "requirement or prohibition based on smoking and health" may be "imposed under State law," does not encompass obligations imposed under the state law of torts. But the argument disregards both the plain meaning of the words Congress actually used and the animating purposes that should inform the interpretation of those words. There is no reason to suppose that Congress intended to exclude common law from the comprehensive phrase "State law"—particularly in light of its action in 1969 specifically rejecting the narrower Senate-passed version of the legislation, which limited preemption to state "statute[s]

or regulation[s]." See page 11, *supra*. Nor is there any reason to think that Congress would suppose that state law enforced by damage awards does not impose "requirements." It is, after all, elementary learning that tort liability may be imposed only when the defendant has violated a legal *duty* owed to the plaintiff. Courts and juries deciding failure-to-warn cases cannot rule in favor of plaintiffs without finding that the defendant violated a requirement of state law; without such a finding, an award of damages would be wholly lawless.

Further, this Court's cases make it entirely clear that the Supremacy Clause does not recognize a distinction in principle between "State law" in the form of statutes or administrative regulations, and state common law rules enforced by judges and juries. See, *e.g.*, *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141 (1982); *Chicago & Northwestern Transp. Co.* v. *Kalo Brick & Tile Co.*, *supra*; *Farmers Educational & Cooperative Union* v. *WDAY, Inc.*, 360 U.S. 525 (1959). The Court made the point unmistakably clear in the classic case of *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 246-247 (1959), in language that has become celebrated and that is directly apposite to this case:

> Nor is it significant that California asserted its power to give damages rather than to enjoin what the [NLRB] may restrain though it could not compensate. Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.

c. Finally, the court of appeals was quite correct in concluding that, to allow petitioner to claim that respondents failed to provide adequate warnings about the health hazards of cigarette smoking, would obviously frustrate the " 'accomplishment and execution of the full purposes and objectives' " of Congress (*Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. at 156, quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)).

Congress did not leave those purposes and objectives to speculation. Congress stated that it wanted to establish "a *comprehensive* Federal Program" to deal with cigarette labeling and advertising with respect to "*any* relationship between smoking and health." This program was to be the means "*whereby*" the public was to be "*adequately*" informed that smoking may be hazardous to health. The information was to be conveyed by a "warning to that effect" on each cigarette package. The terms, size, and placement of the warning were elaborately specified by Congress itself. "*No*" other health warning was allowed to be required, and "*no*" other requirement or prohibition based on smoking and health could be imposed by state law on the advertising and promotion of cigarettes. The purpose of specifying the warning requirements was itself spelled out: to protect "commerce and the national economy" to the "*maximum extent*" consistent with *Congress*' warning scheme and to prevent the impeding of commerce and the national economy by "*diverse, nonuniform, and confusing*" labeling and advertising regulations addressed to "*any*" relationship between smoking and health.

In the face of this articulated statutory scheme, petitioner asserts that Congress nevertheless was blithely prepared to countenance the prospect of juries all over the country sitting down and themselves going through precisely the process that Congress went through in 1965 and again in 1969 and 1984—that is, determining exactly what warnings should be given to the public. He

asserts that Congress would have cheerfully agreed to the spectacle of these juries concluding that the congressionally drafted warning was inadequate and that the cigarette manufacturers should have given different or additional warnings. He asserts that, although Congress specified that it wished to prevent the burdening of commerce by diverse, nonuniform, and confusing cigarette labeling and advertising requirements, it nevertheless intended to open the doors to the imposition of divergent and amorphous common-law "duty to warn" standards by different juries sitting in the various states.

The court of appeals correctly declined to adopt these puzzling assertions. It correctly rejected the implausible notion that Congress—having just enacted a statute that explicitly sets forth a prescribed uniform federal warning, having stated that that warning is "adequate," and having designated it to be the sole warning that may be required, nevertheless intended that on the very next day judges and juries all over the land should be entirely free to conclude that this warning is inadequate.[11] As the court of appeals stated, "claims relating to smoking and health that result in liability for noncompliance with warning, advertisement and promotion obligations other than those prescribed in the Act have the effect of tip-

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[11] Petitioner asserts (Pet. 6 & n.4) that the legislative history supports the conclusion that Congress assumed that "state tort actions" would survive the Act. The referenced selections from the legislative history are simply isolated passages (drawn from the thousands of pages of legislative history) discussing the continued viability of "assumption of risk" defenses; they show, at most, that a few legislators assumed that *some* common law actions would survive the Labeling Act. But this is an unremarkable conclusion that no one contests and that is fully consistent with the opinion of the court of appeals. None of the passages indicates that Congress, having just enacted a comprehensive and uniform federal warning program, contemplated that plaintiffs would be free to bring actions whose necessary predicate is that the congressional program is inadequate.

ping the Act's balance of purposes and therefore actually conflict with the Act" (Pet. App. 17a).

3. a. Petitioner argues (Pet. 14) that the court of appeals' decision conflicts with this Court's decision in *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984). But the argument ignores fundamental differences between the statute involved in *Silkwood* and the Labeling Act. The Atomic Energy Act of 1954, 42 U.S.C. 2011 *et seq.*, at issue in *Silkwood*, contains no preemption provision whatever. See *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 205 (1983). Moreover, although the Atomic Energy Act has been read by this Court by implication to confer exclusive federal jurisdiction to regulate issues of nuclear safety,[12] it also preserves significant authorities for the states.[13] In contrast, the "comprehensive Federal Program" established by the Labeling Act contains a sweeping preemption provision and conspicuously fails to provide *any* role for the states in the area of cigarette labeling, advertising, or promotion. The Atomic Energy Act does not set out a congressionally defined list of safety measures. It nowhere suggests that Congress' purpose was to establish a "comprehensive Federal Program" and that the economy was to be protected against "diverse, nonuniform, and confusing" atomic energy regulation. Indeed, the Act nowhere suggests that its purpose was that each atomic energy plant in the country should be equipped with identical safety features. In

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[12] See *Silkwood*, 464 U.S. at 240, 241; *Pacific Gas & Electric Co.*, 461 U.S. at 205.

[13] See, *e.g.*, 42 U.S.C. 2018 (Act does not affect state authority with respect to generation, sale, or transmission of electric power through use of federally-licensed nuclear facilities); 42 U.S.C. 2021(b) (authorizing federal-state agreements whereby states may assume regulatory authority over certain nuclear materials); 42 U.S.C. 2021(k) (section does not affect state authority to regulate activities for purposes other than protection against radiation hazards).

other words, the Atomic Energy Act—although interpreted by this Court to exclude state legislatures and agencies from participating in the safety aspects of the regulatory enterprise—does not create a single, uniform, congressionally devised regulatory standard at all. Its scheme is, thus, entirely different from the scheme of the Labeling Act.

Even more significant, the enactment and legislative history of the Atomic Energy Act, as amended by the Price-Anderson Act, Pub. L. No. 85-256, 71 Stat. 576, make clear Congress' considered and explicit judgment that state common law damage actions should be permitted to continue. See *Silkwood*, 464 U.S. at 251-256. Indeed, the Price-Anderson Act, which established an indemnification scheme for the operators of federally licensed nuclear facilities, would have been totally unnecessary in the absence of a congressional determination that state common law tort actions were not preempted by the Atomic Energy Act.[14] For that reason, it was the *starting place* in *Silkwood*, and *common ground* among all the parties, that state common law damage actions were *not* preempted; the *only* issue was the much more refined question whether *punitive* damages (in contradistinction to compensatory damages) were preempted. This Court's decision—that punitive damages were not preempted—was based on the unremarkable conclusion that such damages are part and parcel of the "traditional state tort law" that Congress had decided to preserve. *Silkwood*, 464 U.S. at 255.

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[14] This congressional determination was reaffirmed in 1966 when Congress amended the Price-Anderson Act. Pub. L. No. 89-645, 80 Stat. 891. The amendment was passed in response to concerns over the adequacy of state-law remedies and set up a strict liability scheme in the event of an "extraordinary nuclear occurrence." The entire discussion surrounding the 1966 amendment was premised on the "assumption that state remedies were available notwithstanding the NRC's exclusive regulatory authority." *Silkwood*, 464 U.S. at 254.

Silkwood thus took for granted the answer to the central issue in this case—whether state common law damage actions based on alleged failure to provide adequate warnings of the health consequences of smoking are permissible in the first instance. Indeed, in *Silkwood* the Court stressed that "recovery of damages based on state law" is preempted where "imposition of a state standard in a damages action would frustrate the objectives of the federal law" (464 U.S. at 256).[15]

b. Petitioner also cites *Ferebee* v. *Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir.), cert. denied, 105 S. Ct. 545 (1984), in support of his contention that there exists a conflict among the circuits over the preemption question at issue in this case. Again, petitioner is relying on a decision involving an entirely different regulatory scheme. *Ferebee* held that Maryland tort claims were not preempted by the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. 136 *et seq.* Unlike the Labeling Act, which mandates a sin-

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[15] Petitioner relies (Pet. 16) on this Court's statement in *Silkwood*, 464 U.S. at 251, that "[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." But that statement is not apposite to this case. For it is the premise of the preemption analysis in this case that the cigarette manufacturers have *not* engaged in any "illegal conduct" with respect to their duty to warn consumers of the relationship between smoking and health so long as they have complied with the congressionally mandated warning requirement. Further, Congress did not take anything away from cigarette consumers when it enacted the Labeling Act. On the contrary, Congress knew that consumers had been uniformly unsuccessful in common law damage actions brought prior to the enactment of the federal legislation. See cases collected by the district court at Pet. App. 52a-53a; *Cigarette Labeling and Advertising: Hearings on H.R. 2248 etc. Before the House Comm. on Interstate & Foreign Commerce*, 89th Cong., 1st Sess. 176-178 (1965). Thus, the federally mandated warnings, along with the penalties prescribed for noncompliance, *gave* consumers adequate means to protect themselves, while at the same time preserving their ability to continue to smoke if they so chose.

gle congressionally drafted warning for a single product. FIFRA applies to some 40,000 different herbicide and pesticide formulations (see 16 Env't Rep. (BNA) 9 (May 3, 1985)) and requires each manufacturer to draft a warning label for each product for approval by the Environmental Protection Agency. Thus, two manufacturers of the same regulated product may use *different* labels of their own choosing, provided only that they obtain prior EPA approval. Obviously, Congress was not concerned about uniform labels throughout the country as it was in the Labeling Act.

Moreover, FIFRA permits the states to "impose more stringent constraints on the *use* of EPA-approved pesticides than those imposed by the EPA" (*Ferebee*, 736 F.2d at 1541). As the District of Columbia Circuit held, "[t]he fact that Congress has authorized this form of state action also disposes of any argument that such state tort remedies impose undue burdens on interstate commerce." *Ibid.* In sum, FIFRA nowhere contains any indication that its purpose was to create a "*comprehensive Federal Program*" that would protect commerce and the national economy from diverse, confusing, and nonuniform labels. The Labeling Act, on the other hand, was intended to achieve precisely that objective.[16]

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[16] In addition to *Ferebee*, petitioner cites a number of cases as support for the proposition that "the overwhelming consensus of the courts has been that compliance with federally mandated labeling requirements does not immunize a manufacturer from liability based on failure to adequately warn of the dangers in those products" (Pet. 8 & n.6). None of these cases dealt with statutes at all like the Labeling Act, which established a specific congressionally mandated warning as part of a "comprehensive Federal Program." Indeed, *Raymond* v. *Riegel Textile Corp.*, 484 F.2d 1025 (1st Cir. 1973), involved a statute, the Flammable Fabrics Act, 15 U.S.C. 1191 *et seq.*, that expressly authorizes state standards that are more stringent than those required by federal law (15 U.S.C. 1203(b)).

Nor is petitioner aided by the other cases cited. *Maize* v. *Atlantic Refining Co.*, 352 Pa. 51, 41 A.2d 850 (1945), did not involve a federal statute; the court simply rejected defendants' citation of a

4. In a brief amicus, the American Heart Association (and other health organizations) present a misleading and wholly artificial account of the opinion of the court of appeals in order to persuade this Court that the decision below is an eccentric departure from conventional preemption analysis. If one were to read that brief (and fail to take the precaution of also reading the opinion below) one would suppose that the court of appeals relied on wholly *extra*-statutory grounds in concluding

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case from another jurisdiction that held that a similar label was adequate because, *inter alia*, it was approved by the Surgeon General of the United States, who was not even authorized to prescribe labeling standards. *Hubbard-Hall Chemical Co.* v. *Silverman*, 340 F.2d 402 (1st Cir. 1965), involved a label approved by the Department of Agriculture pursuant to FIFRA, a statute that has already been fully discussed. *Blasing* v. *P.R.L. Hardenbergh Co.*, 226 N.W.2d 110 (Minn. 1975), simply held that compliance with federal regulations regarding, *inter alia*, the labeling of flammable products was not conclusive on the issue whether the defendant was negligent—the court did not examine whether the federal statute preempted state law. In fact, the court did not even name or cite the federal statute or regulations involved. Finally, *Brochu* v. *Ortho Pharmaceutical Corp.*, 642 F.2d 652 (1st Cir. 1981); *Skill* v. *Martinez*, 91 F.R.D. 498 (D.N.J. 1981), aff'd, 677 F.2d 368 (3d Cir. 1982); *Stevens* v. *Parke, Davis & Co.*, 9 Cal. 3d 51, 507 P.2d 653, 107 Cal. Rptr. 45 (1973); and *Arata* v. *Tonegato*, 152 Cal. App. 2d 837, 314 P.2d 130 (1954), all involved warnings on drugs or other products regulated by the Food and Drug Administration. This Court has made it clear that Congress has determined that it is normally for the FDA to decide whether its regulations need (and therefore have) preemptive effect. *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 105 S. Ct. 2371 (1985). The FDA frequently does not seek uniformity in drug company warnings. On the other hand, when FDA regulations are designed to have preemptive sweep, the courts have consistently respected this purpose and have held state regulations preempted. See, *e.g.*, *National Women's Health Network, Inc.* v. *A.H. Robins Co.*, 545 F. Supp. 1177, 1181 (D. Mass. 1982); *Pharmaceutical Society of New York, Inc.* v. *Lefkowitz*, 454 F. Supp. 1175 (S.D.N.Y.), aff'd, 586 F.2d 953 (2d Cir. 1978); *Cosmetic, Toiletry & Fragrance Ass'n* v. *Minnesota*, 440 F. Supp. 1216 (D. Minn. 1977), aff'd, 575 F.2d 1256 (8th Cir. 1978).

that allowing failure-to-warn claims to persist would be inconsistent with the Labeling Act (*e.g.*, according to amici the court of appeals engaged in an "open-ended inquiry, under which the court independently balanced what it saw as the appropriate interests and reached what it thought was the proper result, without regard to what Congress legislated explicitly in section 1334" (Amicus Br. 6)). But what the court of appeals did in fact was to rely entirely and exclusively on the explicit terms of Sections 1331 and 1334 of the Act. (Amici apparently assume that Section 1331 of the statute does not "count" as an authoritative part of the statute at all. But that is obviously wrong. Congress spelled out its purposes in *statutory* language just so that the interpretation of the statute could and would not become an adventure in "uncharted waters" (Amicus Br. 6).) What the court of appeals held was that, even though Section 1334 does not in terms refer to the preemption of tort claims, interpreted in light of Congress' elaborate—and authoritative—statement of its purposes in Section 1331, the preemptive language of the statute takes on a clear and unambiguous meaning: "[T]he preemption provision of Section 1334, read together with Section 1331, *makes clear* Congress's determination that [the Act's] balance would be upset by either a requirement of a warning other than that prescribed in Section 1331 or a requirement or prohibition based on smoking and health 'with respect to the advertising or promotion' of cigarettes" (Pet. App. 16a). This represents wholly conventional and correct preemption methodology and in no way resembles the "major analytical error" (Amicus Br. 6) that seems to excite amici.[17]

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[17] Amici also suggest (Br. 2-3) that the complaint should not be deemed preempted because it can be characterized as an attack on the respondents' advertising practices. But Congress, in passing the Act, was well aware of the nature of—and the controversies surrounding—cigarette advertising; and it acted in the context of that knowledge when it carefully outlawed all state law "requirements"

5. The court of appeals in this case did no more than to accept as law Congress' plain words and fully articulated purposes. It resolved the issue of preemption in an obviously sensible, sensitive and correct manner. There exists, therefore, no good reason why this Court should exercise its discretionary jurisdiction to review the very first case—and an interlocutory one at that—presenting the issue of the preemptive effect of the Labeling Act. This Court will have ample opportunity in the future to determine whether it wishes to address the meaning of the preemption provisions of the Act. But there is no sound reason why it should rush to intervene here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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and all state-law "prohibitions" based on "smoking and health" with respect to the "advertising" *or* the "promotion" of properly labeled cigarettes.

ADDENDUM

ADDENDUM

FEDERAL CIGARETTE LABELING AND ADVERTISING ACT

15 U.S.C. 1331-1340 (1982)

§ 1331. Congressional declaration of policy and purpose

It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal Program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—

(1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and

(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

§ 1332. Definitions

As used in this chapter—

(1) The term "cigarette" means—

(A) any roll of tobacco wrapped in paper or in any substance not containing tobacco, and

(B) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (A).

(2) The term "commerce" means (A) commerce between any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, or Johnston Island and any place outside thereof; (B) commerce between points in any state, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, or Johnston Island, but through any place outside thereof; or (C) commerce wholly within the District of Columbia, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, or Johnston Island.

(3) The term "United States", when used in a geographical sense, includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, and Johnston Island. The term "State" includes any political division of any State.

(4) The term "package" means a pack, box, carton, or container of any kind in which cigarettes are offered for sale, sold, or otherwise distributed to consumers.

(5) The term "person" means an individual, partnership, corporation, or any other business or legal entity.

(6) The term "sale or distribution" includes sampling or any other distribution not for sale.

(7) The term "little cigar" means any roll of tobacco wrapped in leaf tobacco or any substance containing tobacco (other than any roll of tobacco which is a cigarette within the meaning of subsection (1)) and as to which one thousand units weigh not more than three pounds.

§ 1333. Labeling; requirement; conspicuous statement

It shall be unlawful for any person to manufacture, import, or package for sale or distribution within the United States any cigarettes the package of which fails to bear the following statement: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health". Such statement shall be located in a conspicuous place on every cigarette package and shall appear in conspicuous and legible type in contrast by typography, layout, or color with other printed matter on the package.

§ 1334. Preemption

(a) Additional statements

No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.

(b) State regulations

No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

§ 1335. Unlawful advertisements on medium of electronic communication

After January 1, 1971, it shall be unlawful to advertise cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission.

§ 1336. Authority of Federal Trade Commission

(a) Action prior to and after July 1, 1971

The Federal Trade Commission shall not take any action before July 1, 1971, with respect to its pending trade

regulation rule proceeding relating to cigarette advertising. If at any time on or after July 1, 1971, the Federal Trade Commission determines it is necessary to take action with respect to such pending trade regulation rule proceeding, it shall notify the Congress of the determination. Such notification shall include the text of the trade regulation rule and a full statement of the basis for such determination. No trade regulation rule adopted in such proceeding may take effect until six months after the Commission has notified the Congress of the text of such rule, in order that the Congress may act if it so desires.

(b) Unfair or deceptive acts or practices

Except as provided in subsection (a) of this section, nothing in this chapter shall be construed to limit, restrict, expand, or otherwise affect the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes.

(c) Issuance of trade regulation rules or requirements for affirmative statements in advertising

Nothing in this chapter shall be construed to affirm or deny the Federal Trade Commission's holding that it has the authority to issue trade regulation rules or to require an affirmative statement in any cigarette advertisement.

§ 1337. Reports to Congress

(a) Secretary of Health and Human Services

The Secretary of Health and Human Services shall transmit a report to the Congress not later than January 1, 1971, and annually thereafter, concerning (A) current information in the health consequences of smoking, and (B) such recommendations for legislation as he may deem appropriate.

(b) Federal Trade Commission

The Federal Trade Commission shall transmit a report to the Congress not later than January 1, 1971, and annually thereafter, concerning (A) the effectiveness of cigarette labeling, (B) current practices and methods of cigarette advertising and promotion, and (C) such recommendations for legislation as it may deem appropriate.

§ 1338. Criminal penalty

Any person who violates the provisions of this chapter shall be guilty of a misdemeanor and shall on conviction thereof be subject to a fine of not more than $10,000.

§ 1339. Injunction proceedings

The several district courts of the United States are invested with jurisdiction, for cause shown, to prevent and restrain violations of this chapter upon the application of the Attorney General of the United States acting through the several United States attorneys in their several districts.

§ 1340. Cigarettes for export

Packages of cigarettes manufactured, imported, or packaged (1) for export from the United States or (2) for delivery to a vessel or aircraft, as supplies, for consumption beyond the jurisdiction of the internal revenue laws of the United States shall be exempt from the requirements of this chapter, but such exemptions shall not apply to cigarettes manufactured, imported, or packaged for sale or distribution to members or units of the Armed Forces of the United States located outside of the United States.